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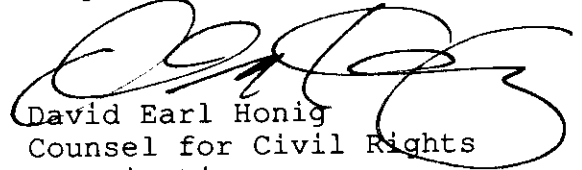
Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Dear Ms. Salas:

RE: MM Docket No. 99-25 (Low Power Radio)

On behalf of the Minority Media and
Telecommunications Council et al. ("Civil Rights
Organizations"), transmitted herewith are the
original and four copies of our Comments. They
are filed a day out of time, owing to difficulty
in processing the document yesterday.
Consideration of the Comments nunc pro tunc is
respectfully requested.

Respectfully submitted,


David Earl Honig
Counsel for Civil Rights
Organizations

Enclosures

cc (w/enclosures):

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of) MM Docket No. 99-25
Creation of a Low Power Radio Service) RM-9209
TO THE COMMISSION) RM-9241

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COMMENTS OF CIVIL RIGHTS ORGANIZATIONS

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National Hispanic Media Coalition
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Native American Journalists Association
Project on Media Ownership
Puerto Rican Legal Defense & Education Fund
Rainbow/PUSH Coalition
San Diego Community Broadcasting School
Telecommunications Research and Action Center
Women's Institute for Freedom of the Press

August 2, 1999

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DEDICATION: JUDGE FRANK M. JOHNSON

Far too many civil rights heroes have fallen this year -- Judge Leon Higginbotham, who mentored more civil rights lawyers than any American this century; Chancellor Seitz, whose rulings desegregating the Delaware public schools were affirmed in Brown v. Board of Education; Virginia Durr, who bailed out Rosa Parks and provided aid and sanctuary to so many civil rights workers in Alabama in the most dangerous years of the movement, Harry Plotkin, who generously taught this writer and, in 1953, was the first to ask the FCC to deny licenses to discriminators on character grounds, and many more.

On July 23, we lost a hero among heroes -- Federal District Judge Frank M. Johnson of Montgomery, Alabama. It is with the greatest love and respect that we dedicate these comments to him.

"Judicial activism" has a bad name today, but Judge Johnson practiced it with pride at a time when the executive and legislature lacked the will to protect the rights of the least protected among us. Finding new life in the due process and equal protection clauses, Judge Johnson was responsible for enabling Blacks and women to serve on juries, integrating the University of Alabama, providing that court-appointed defense attorneys be paid from public funds, affording state principals adequate food and medical treatment, desegregating the Alabama state police, and helping desegregate parks, restaurants, transportation facilities and schools, and helping bring about "one man, one vote." These accomplishments are breathtaking in their scope, illustrating what a single fair minded person with a gavel can achieve.

Frank Johnson's jurisprudence anticipated the FCC's action in proposing to open the FM airwaves to hundreds or thousands of new voices. In his 1965 holding that the State of Alabama had no right to prevent the Selma to Montgomery march, Judge Johnson recognized that states cannot withhold public highways for the purpose of restricting speech. He wrote:

It seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.

In like manner, in this NPRM, the Federal Communications Commission has recognized that it cannot withhold the public airwaves for the purpose of artificially restricting speech.

If we someday are blessed to have access to microphones belonging to an LPFM station, we will use the airtime to tell the public who Judge Frank M. Johnson was, and to encourage those who are listening to live and breathe the values his life exemplified.

* * * * *

SUMMARY

These Comments, filed by virtually all of the nation's leading civil rights organizations and by the representatives of all of the nation's minority broadcasting schools, unequivocally endorse the FCC's proposal to create a low power FM service. LPFM will stimulate competition in broadcasting and enhance the diversity of voices in local communities,

LPFM will be especially useful in providing entry opportunities to minorities and women. LPFM is a race and gender neutral approach to remedying years of exclusion, the effects of which have been exacerbated by judicial restrictions on race-conscious remedies, the abandonment of the tax certificate policy, the mootness of the FCC's other minority incentive programs, and the threat to Black and Spanish radio posed by the local market concentration spawned by the Telecommunications Act of 1996.

LPFM should be owned by nonprofits and operated noncommercially, with stations throughout the FM band. Like most LPFM proponents, we endorse a maximum power of 50 watts for urban stations and 100 watts for rural stations.

As a local service, LPFM should be locally owned, with one station to a licensee locally and nationally and no LMAs. To ensure that only serious applications are filed, we advocate a five year minimum license holding period, waivable only in hardship cases.

Licenses should be awarded within a series of windows on a first-come, first-served basis within each window. The first window should be reserved for minority broadcasting training institutions, including historically Black colleges and universities, Hispanic serving institutions and Native American training centers, as well

as non-college based minority broadcast schools. We present extensive evidence to demonstrate that this first-window proposal is constitutionally permissible -- and necessary -- to remedy the effects of the FCC's own past discrimination, and ratification of the discrimination of its licensees in educational and commercial broadcasting.

To reward full power broadcasters for assisting minority broadcast training institutions, we propose that if a full power broadcaster helps a minority school train students in broadcast sales, the commercial station should be permitted to place a modest amount of inventory on the school's LPFM station, with the commercial station and the school sharing the ad revenues.

Finally, we do not agree that those who went on the air prematurely should automatically be disqualified from owning LPFMs. Many acted out of good faith civil disobedience in the tradition of Thoreau, Gandhi and King. The FCC's character standard is not so invasive that it reaches those who merely disagree with the government on the meaning of the First Amendment.

Someday, most incumbent broadcasters will come to appreciate the value of LPFM to the industry. LPFM will be the training ground for the next generation of full power broadcasters. We are confident that incumbent broadcasters will come to embrace LPFM as the savior of the industry. They will wonder out loud why they ever doubted its value.

★ ★ ★ ★ ★

The 24 organizations joining in these comments (collectively "Civil Rights Organizations") represent members and constituents who include the vast majority of people of color in the United States, We support with great enthusiasm most of the Commission's proposals in its NPRM, 14 FCC Rcd 2471 (1999) ("NPRM").^{1/}

Background

The civil rights community has long championed the wider use of radio in the public interest (see 47 U.S.C. §303(g)), and many of us were among the first to call for the creation of an LPFM service.^{2/} We applaud the FCC for recognizing the urgent need for more outlets for local expression. The needs of minority radio listeners are especially urgent, and it is on their behalf that we offer these Comments.

^{1/} The views expressed in these Comments are the institutional views of the organizational commenters, and do not necessarily reflect the individual views of any commenter's officers, directors or members.

^{2/} See Reply Comments of MMTC, the Rainbow/PUSH Coalition and the League of United Latin American Citizens in response to RM-9208 (Low Power FM Radio), filed July 24, 1998 (urging creation of an LPFM service that would facilitate the needs of small cities or neighborhoods in large cities and would generate sufficient revenue to operate as "niche" facilities and that would allow people of limited financial means to have access to the airwaves); Letter to Roy Stewart, Esq. and William Kennard, Esq. from David Honig, Executive Director, MMTC, August 6, 1997 (urging "the creation of a new class of FM stations, large enough to serve a small city or a neighborhood in a large city and to generate sufficient revenue to operate as niche facilities" to respond to "the rapid deterioration in opportunities for small businesses, minorities, and new entrants.")

I. There Is A Compelling Need For Low Power FM Service

**A. LPFM would stimulate competition
in the marketplace of ideas**

With the issuance of the NPRM, the Commission finds itself in the familiar position of reminding many incumbent broadcasters that there is no such thing as too much speech.

Every time it has considered whether to adopt a new service, certain incumbents have argued that the new entrants would take listeners or viewers from them. These incumbents sought protection because they feared that new entrants might provide better programming, or because spectrum had to be reapportioned to make room for the new entrants.

The FCC has no business protecting incumbents from competition or "protecting" the public from new voices. A very radical spectrum restructuring that would drive most incumbents out of business would be anti-consumer, but the NPRM proposes no such thing. Instead, the NPRM seeks to provide access for the weakest new entrants imaginable, and it does this at a time when full power broadcasters have never been stronger and more capable of taking on any newcomers.

We are proud to support most of the proposals in the NPRM because the Commission kept its eyes on the First Amendment objective of maximizing the range of views available to the public.^{3/} As the Commission declared over a generation ago:

^{3/} Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("Red Lion") ("[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of the market.")

[a] proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital....It might be that the 51st licensee...would become the communication channel for a solution to a severe local social crisis. No one can say that the present licensees are broadcasting everything worthwhile that can be communicated.

Multiple Ownership of Broadcast Stations, 22 FCC2d 306, 311 (1970).

Arguments that full power incumbents need protection from LPFM hark back to the long-discredited Carroll doctrine.^{4/} The Commission has emphatically rejected the contention that the spectrum should be artificially underutilized to protect incumbents.^{5/}

For a generation, the Commission, Congress and the courts were happy to grant full power broadcasters' every request for

4/ See Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958). Preferring to rely on market forces, the Commission abandoned the Carroll doctrine and its underlying premise of "ruinous competition" in Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations (Report and Order), 3 FCC Rcd 638, 640 (1988).

5/ See, e.g., Commercial FM Broadcast Assignments (EC Docket 80-90) (R&O) 94 FCC2d 152, 158 (1983) ("Commercial FM Assignments") (noting that a "basic objective" of the Commission has been to provide "outlets for local expression addressing each community's needs and interests"); Television Channel Allotments (VHF Drop-ins) (NPRM), FCC 80-545, 45 FR 72902 (November 3, 1980) at ¶¶9, 12 ("any potential loss experienced [by incumbents] will be more than offset by the benefits of such a policy -- additional television service for the public...it is in the public interest to have a regulatory framework that permits the maximum number of signals that can be economically viable" (fn. omitted). A fine exposition of this approach is found in the separate statement of Chairman Fowler and Commissioner Dawson in the Low Power Television (R&O), 51 RR2d 476, 525 (1982): "Low power television may not have the transmission capabilities of full broadcast television, but its capacity to provide televised programming that is directly responsive to the interests of smaller audience segments makes it truly unique in its ability to expand consumer choices in video programming. From this perspective, the power of these stations may be low, but their potential is enormous."

deregulation. Broadcasters have been relieved of, inter alia, obligations to preserve unique formats,^{6/} to ascertain needs,^{7/} to program to meet those needs,^{8/} to restrict commercialization,^{9/} to broadcast modest amounts of nonentertainment programming,^{10/} to broadcast local programming,^{11/} to observe the Fairness Doctrine,^{12/} to program most of the airtime on stations they own,^{13/} to limit themselves to two stations per market^{14/} and then to limit themselves to four stations per market,^{15/} to evaluate EEO compliance against minority representation in the community,^{16/} to defend discriminatory conduct in hearing^{17/} and indeed to defend

^{6/} FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

^{7/} Deregulation of Radio, 84 FCC2d 968, recon. granted in part, 87 FCC2d 797 (1981), aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).

^{8/} Deregulation of Radio, 84 FCC2d at 993.

^{9/} Id. at 1008.

^{10/} Id. at 977.

^{11/} Id. at 978-99.

^{12/} Fairness Report, 2 FCC Rcd 5272, 5295 (1987).

^{13/} Revision of Radio Rules and Policies (R&O), 7 FCC Rcd 2755, 2787 ¶63 (1992).

^{14/} Id. at 2777 ¶40.

^{15/} Telecommunications Act of 1996, Pub. L. No. 104-104, §202(b)(1), 110 Stat. 56 (codified at 47 C.F.R. §73.3555(A)(1) (1996)).

^{16/} Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344, rehearing denied, 154 F.3d 487 (D.C. Cir. 1998) ("Lutheran Church").

^{17/} Id. (affirming bizarre decision, later vacated on other grounds, that held that failing to recruit African Americans on the theory that they do not listen to classical music was not discriminatory without evidence that a particular person applied and was turned down.)

almost any other kind of misconduct in hearing,^{18/} and -- two weeks ago -- to buy nonreserved public broadcast stations even if no replacement public service is available.^{19/} Incumbent commercial broadcasters can hardly cry that they are oppressed.^{20/}

Some incumbent broadcasters' opposition to LPFM stems from the fact that LPFM would consume some spectrum space they have become accustomed to using. But broadcasters do not own this spectrum. Indeed, they do not object to spectrum reallocations similar to the one proposed in the NPRM as long as incumbents benefit.^{21/} Thus, "engineering" arguments are Carroll arguments in disguise.

^{18/} There are virtually no hearing designation orders issued anymore for any reason. A rare example of what one must do to lose a license is found in Contemporary Media, Inc., FCC 99-81 (released April 28, 1999), in which the Commission revoked several licenses. The licensee is in jail for serial child abuse, and after his conviction for these crimes, he allegedly secretly continued to run the stations after telling the Commission otherwise.

^{19/} Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Buffalo, New York) (R&O), DA 99-1442 (released July 23, 1999) (on file with counsel).

^{20/} We point this out not to condemn all deregulation. Regulation is not always zero-sum; some deregulation has benefitted consumers. For example, the end of format protection and commercialization restrictions have probably been helpful to minority owners, thereby enhancing diversity. Instead, we seek to place in context incumbent broadcasters' suggestion that the Commission is being unfair to them by proposing LPFM, or cannot be trusted to consider their legitimate interests and needs when it makes spectrum management decisions.

^{21/} Incumbent broadcasters do not object to FM translators and boosters; instead, they apply for them. They do not even object to closely spaced first adjacent stations. According to BIA's 1999 Radio Market Report, there are six commercial first-adjacent pairs between the Washington and Baltimore markets, all involving Class B facilities: WFLS-FM (93.3) and WPOC-FM (93.1); WGMS-FM (103.5) and WXCX-FM (103.7); WWZZ-FM (104.1) and WOCT-FM (104.3); WJZW-FM (105.9) and WQSR-FM (105.7); WJFK-FM (106.7) and WMMX-FM (106.5); and WTOP-FM (107.7) and WFSI-FM (107.9).

The almost de minimis reallocation of spectrum from incumbents to newcomers contemplated by the NPRM would be a very small price to pay to bring hundreds or thousands of new voices onto the airwaves. "Interference" is a relative concept, and interference standards are inherently arbitrary. Thus, the claim that LPFM would cause some interference is obviously true but misses the point. For example, is a 1% loss in audience by incumbents worth it to the public if, in return, we get a 50% increase in the number of voices nationwide yielding an average 10% increase in the number of listenable signals? These numbers may be off, but this is the question the NPRM has asked. It is the right question.

B. LPFM would enhance the diversity of voices available to each local community

Section 307(b) of the Act manifests Congress' desire that the Commission design the broadcast service to ensure local service to local communities.^{22/} In exercising its Section 307(b) responsibilities, the Commission has sought to achieve three goals: (1) provision of some service to all of the nation; (2) provision of multiple program choices; and (3) local service to as many communities as possible; that is, multiple outlets for local self expression addressed to each community's needs and interests.^{23/} Although clear channel AM stations initially served the first of these goals very well, the Commission did not find it difficult to

^{22/} 47 U.S.C. §307(b) states: "In considering application for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

^{23/} Revision of FM Broadcast Rules, 40 FCC 662, 664 (1962); see also WHW, Inc. v. FCC, 753 F.2d 1132 (D.C. Cir. 1985).

cut back on the interference protected nighttime contours of these stations in order to permit the creation of new stations serving the other two Section 307(b) goals.^{24/}

The Commission has now succeeded in fulfilling the first and second Section 307(b) goals, but it has a long way to go before it succeeds with the third. An LPFM service is the only means anyone has proposed since Docket 80-90 to meet this third goal of providing multiple outlets for local self-expression.

Owing to its immediacy, receiver portability, and universal free access to consumers, radio broadcasting is by far the most efficient medium capable of serving local neighborhoods. Recognizing this, the Commission has treated localism as the bedrock of the broadcast system.^{25/} Its localism policy has been the Commission's most important means for promoting viewpoint diversity.^{26/}

The local character of radio has been weakened by the consolidation of ownership resulting from the 1996 Act. The number of independent local voices has dropped sharply in the past three years, with most of those lost to broadcasting being small, locally-based and minority broadcasters.^{27/} Consolidation has also

24/ Clear Channel Broadcasting in the AM Broadcast Band, 78 FCC2d 1345 (1980).

25/ See Commercial FM Assignments, 94 FCC2d at 158 (a "basic objective" of the Commission has been to provide "outlets for local expression addressing each community's needs and interests.")

26/ See, e.g., FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 360 n. 1 and 362 n. 4 (1965) (holding that the distribution of a license to a community in order to secure local competition for originating and broadcasting programs of local interest fell within the Commission's allowable area of discretion to make a "fair, efficient, and equitable distribution of radio service" among different localities.")

spawned an increase in the number of absentee owners. Even the best-intentioned absentee owners are less likely than local owners to know their communities.

Thus, the Civil Rights Organizations propose herein that all LPFM stations be locally owned. See pp. 20-22 infra. Local ownership does not always guarantee that stations will be more responsive to local needs, but local residents are far more likely to know local issues.^{28/} Almost no LPFM owners would be able to afford an experienced manager; thus, the choice for LPFM would be between an inexperienced manager reporting to an absentee owner, and an inexperienced manager who is the owner.^{29/} That choice isn't close.

We also propose that all LPFM stations be noncommercial. See pp. 16-18 infra. Noncommercial LPFM stations would be highly likely to broadcast substantially more need-responsive public affairs and public service programming than the typical commercial station.

^{27/} See Kofi Ofori, Karen Edwards, Vincent Thomas and John Flateau, Blackout? Media Ownership Concentration and the Future of Black Radio (1996). See also A. DeBarros, "Radio's Historic Change: Amid Consolidation, Fear of Loss of Diversity, Choice," USA Today, July 8, 1998, at 1A-2A.

^{28/} Virtually every state legislature recognizes the importance of local residence in being aware of and sensitive to local needs. This recognition manifests itself in statutes requiring local residence for voters and for candidates for public office. Reapportionment typically ensures that districts are compact enough to allow public servants to effectively advocate for local needs.

^{29/} The D.C. Circuit has found little difference in the abstract between proposals for local owner-operation and a proposal for an absentee owner who would hire an experienced manager. Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992) ("Bechtel I"); Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) ("Bechtel II"). However, in LPFM, the option of hiring and compensating experienced managers would be unavailable. Thus, the Bechtel cases are inapposite. See pp. 22-23 infra.

Furthermore, these stations' service areas would be narrow enough to serve individual neighborhoods, enabling the evolution of programming that addresses community needs too parochial to be addressed by regional stations.^{30/}

Another benefit of LPFM is its ability to respond to the effects of residential segregation -- a cancer that has confined or classified populations geographically based on race, ethnicity or language. Even before the wave of mergers, the small number of available full power licenses frequently left substantial race, ethnic and language groups without service. The shortage of channels relative to need has grown more pronounced because the population is growing in size and diversity while the number of radio stations (except in remote areas) has virtually stopped growing.

Racial, ethnic, or language minorities often lack the numerosity or economic and political clout to motivate a full power station to earmark its programming for them.^{31/} Language

^{30/} Examples of such issues include neighborhood zoning, insurance, cable and telephone redlining, housing discrimination, magnet school programs, and city council district elections. Few full power radio stations focus on these issues now unless the facts are very dramatic or have citywide implications.

^{31/} For example, Miami-Dade County, Florida is home to about 100,000 Haitian Americans whose first language is Creole. Not a single full power station in Miami broadcasts a significant block of programming in Creole. Thus, it is not surprising that as many as fourteen Creole-language microradio or low power FM stations sprung up in Miami over the past two years -- none of them with FCC licenses. This did not reflect any propensity by Haitians to violate the Act; instead, it reflected the desperate need for an electronic lifeline to serve a large, isolated population. Suffice it to say that if 100,000 oppressed Kosovars seeking freedom in Minnesota had no radio service, it would be a national scandal. Indeed, imagine an American city with 100,000 citizens for whom English is the first language. If that city lacked English-language radio service, Congress would be holding hearings on whether the Commission was complying with Section 307(b).

differences often make it especially difficult for even large local populations to receive service from full power stations, inasmuch as it may prove difficult for full power stations to identify trained bilingual broadcast professionals. LPFM neatly solves this problem.

Like low power TV before it, LPFM would be an especially effective means of serving the Commission's localism goals. As with LPTV, specialized and community centered stations should arise to address the unique needs of targeted local areas and neighborhoods. The ties of community identity would be fostered in urban neighborhoods, rural towns and small neighborhoods in large cities. With an electronic link based on ubiquitous technology, these communities would become more cohesive, their residents better informed and better able to survive as part of the larger society.

Finally, LPFM's inexpensiveness will go far to promote diversity of voices. With station prices through the roof, and new full power facilities available (if at all) only through auctions, LPFM would be the only route to station licensure for almost all Americans. LPFM would enable those with limited financial means to find a home on the airwaves.

Two hundred years ago, when only the wealthy could read, publish and vote, America's social and political life embodied an antidemocratic bias in favor of the wealthy. Universal education, access to the printing press and suffrage made possible the labor movement, the women's movement and the civil rights movement, and played a large part in the widespread dissemination of scientific knowledge, the control of disease and the success of the American economy. In this tradition, by placing broadcast technology in the hands of low and middle income Americans, LPFM can do its part to help America achieve the fruits of democracy.

C. LPFM would foster minority ownership

The Commission is at its best when it can find a creative way to promote minority ownership. As it has long recognized, minority ownership is a valuable way to foster diversity of viewpoints.^{32/} The Courts and Congress agree.^{33/}

32/ See also, Waters Broadcasting Co., 91 FCC2d 1260, 1264-1265 ¶¶8-9 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F 2d 601 (1984), cert. denied, 470 U.S. 1027 (1984) (recognizing that a minority broadcaster could provide nonminorities with minority viewpoints they are unlikely to receive elsewhere.)

33/ Justice Brennan's majority opinion in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 580-82 (1990) ("Metro Broadcasting") concluded:

[e]vidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities...minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities.

Congress has also consistently affirmed the Commission's goal of promoting minority ownership. See, e.g., Cable Television Consumer Protection and Competition Act of 1992, H. Rep. 102-628, 102nd Cong. 2d Sess. 1992, at 60; 47 U.S.C. §151 (revised in 1996 to explicitly require that licensing and regulation occur "...without discrimination on the basis of race, color, religion, national origin, or sex"); H.R. Conf. Rep. 97-765, at 26 ("[An] important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities...it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public.") Several provisions of the Telecommunications Act address this issue. See 47 U.S.C. §309(j)(3)(B) (competitive bidding must result in dissemination of licenses among a wide variety of applicants including small businesses and businesses owned by minorities and women); 47 U.S.C. §309(j)(4)(c)(ii) (same with respect to assigning areas and bandwidths); 47 U.S.C. §309(j)(4)(i) (provision of spectrum based services); see also Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, 11 FCC Rcd 6280 (1996) ("Section 257 Proceeding") (implementing Section 257 of the Act, which directs the Commission to promote the policies and purposes of the act favoring diversity of media voices, vigorous economic competition and technological advancement.)

Nonetheless, commercial minority ownership is virtually stagnant,^{34/} and noncommercial minority ownership has been at a standstill for years, with the approximately 35 minority owned noncommercial stations being mostly owned by HBCUs in the south.

Unfortunately, most of the tools which had been available to promote minority ownership are unavailable now. We have lost the EEO Rule, at least temporarily.^{35/} We have lost the comparative hearing policies, which formerly permitted the Commission to choose the best applicant for new service, rather than the wealthiest.^{36/} In 1995, we lost the tax certificate policy, which was responsible for 2/3 of the minority owned stations in the country. We still have the distress sale policy, although hardly any station ever finds itself in distress anymore.^{37/}

For several reasons, LPFM offers the best opportunity to change these unacceptable conditions.

First, LPFM licenses would carry a fair price: zero. When licenses were originally handed out for free, minorities had no a chance to acquire them. See pp. 37-48 infra. Today, to get into

34/ See NTIA, "Minority Commercial Broadcast Ownership in the United States" (August, 1998) ("NTIA") at 1 (indicating that 165 minority broadcasters own 337 of 11,524 commercial and television stations in America). The increase in minority commercial ownership between 1997 and 1998 was only slight, from 2.8% to 2.9%, a total net gain of 15 stations. In 1994 and 1995, minority ownership of broadcast stations was higher than it is today.

35/ Lutheran Church, supra.

36/ Auctions First Report and Order, 13 FCC Rcd 15920 (1998).

37/ The only post-1990 distress sale was a \$50,000 station in a town of 84 people 40 miles from civilization. Desert Broadcasting Co. (MO&O), (MM Docket No. 96-221), Chief, MMB (released June 18, 1997) (on file with counsel) ("Desert Broadcasting").

broadcasting, minorities must buy stations from incumbent operators at huge cash flow multiples. As bidders for these stations, they must compete against far better-financed, often more experienced and better connected nonminority operators.^{38/} LPFM would, at last, allow minorities a genuine opportunity to secure access to the spectrum the old-fashioned way: file an application, pay the filing fee, get a construction permit, build the radio station, cut the ribbon and start broadcasting.

Second, LPFM construction and operating costs would be low. The racial wealth gap between Blacks and Whites is about 11:1.^{39/} Thus, minorities certainly would find LPFM especially attractive. Experience with LPTV supports this prediction. Although LPTV is far more capital-intensive than LPFM would be, minorities have enjoyed considerable success in accessing LPTV technology. About 15% of LPTV stations are minority owned.

Third, as proposed by the Civil Rights Organizations and most LPFM proponents, LPFM would be noncommercial. See pp. 16-18 *infra*. This factor is critical because minorities' lack of access to capital for commercial stations has been documented for years.^{40/} Minorities have relatively far greater access to government

^{38/} This problem has grown more serious since the enactment of the 1996 Telecommunications Act. Minority owners report that since the Act's adoption, they have experienced heightened competition for nationally syndicated programming and have further noted more difficulty in securing advertisers. See NTIA at 3.

^{39/} In 1993, the median net worth per Black family waws \$4,418 and the median net worth per White family was \$45,740. "Nobody is paying much attention to the most striking evidence of racial inequality in the United States," 21 Journal of Blacks in Higher Education 47 (Autumn, 1998) (citing U.S. Census Bureau statistics).

^{40/} Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982).

demonstration funds, foundation grants, educational institution resources and religious institutions than they have to private financing. Minorities have enjoyed many opportunities to learn nonprofit operations and to accede to positions of great power and influence in the academy, the churches, and the rest of the nonprofit world. Consequently, minorities control a substantial proportion of the local and national nonprofit institutions.

Fourth, minority LPFM ownership would be especially well tailored to help remedy the present effects of FCC-sanctioned discrimination in our system of educational broadcasting. See pp. 34-79 infra.

Finally, LPFM would help stimulate minority ownership of commercial stations by providing a large pool of highly motivated, energetic, talented minority broadcast managers and professionals -- a particularly valuable gift to the public now that the EEO Rule in its 1969-1998 incarnation is gone.

D. LPFM would provide a valuable training ground for the next generation of full power broadcasters

Broadcasting's value to the public derives from two factors: audience reach and talent. Talent needs room to grow, and after the 1996 Telecommunications Act, there isn't any more room. Due to local station consolidation, the industry's workforce is shrinking even as the nation's population is increasing and growing more diverse.^{41/} The reduced number of employers in each market has placed additional pressure on broadcast employees not to demand in-house job training. As competition for broadcast jobs increases,

^{41/} According to the FCC's annual broadcast employment databases (maintained from 1971 through 1997), there were 153,058 fulltime broadcast employees in 1995 but only 149,975 in 1997. FCC, 1997 EEO Trend Report (June 6, 1998) at 756.

those with the greatest experience will win and those newest to the industry will lose. Thus, unless there is an outlet for their talent, broadcasting will lose the most creative young minds.

Minorities and women are especially vulnerable in this climate. As a result of Lutheran Church, broadcasters currently have no obligation even to attempt to notify minorities and women of job openings. Recently published data strongly suggests that radio broadcasters have already begun a purge of high level minorities.^{42/}

By providing an outlet for the development of new talent, LPFM would not only reverse the creativity drain, it would attract gifted people who might not otherwise have considered careers in broadcasting. For full power stations, LPFM presents a valuable recruitment, weeding and training ground for tomorrow's top talent.^{43/} LPFM would teach young people -- the hard way -- how to run a radio station like a business.

Because of LPFM's potential to cultivate new talent, many large broadcasters' opposition to LPFM is shortsighted. New talent is the lifeblood of any industry. Opportunities for young people to break into radio are essential to preserve a pool of gifted and experienced people who will operate full power stations tomorrow.

* * * * *

^{42/} RTNDA and Ball State University, "Women & Minorities Employment Statistics" (July, 1999) (reporting, inter alia, that minority radio news directorships dropped from 11% to 8% in the year since we lost the EEO Rule.)

^{43/} Furthermore, as shown herein, full power broadcasters can play an important collaborative role in the development of this new talent base. See pp. 76-79 infra.

**II. Low Power FM Should Be Operated
Noncommercially, With Ownership And
Operating Criteria That Promote Diversity**

**A. LPFM service should be noncommercial and
should be located throughout the FM band**

We advocate a service whose stations would be reserved for noncommercial use.^{44/} The stations should be located throughout the FM band.^{45/}

We support noncommercial LPFM because Americans enjoy far too little local public media. While many commercial stations respond well to community needs, their response is inherently inexact. Commercial broadcasting uses advertiser preferences as a proxy for listeners' wants and needs. Yet some listener tastes and needs are poorly measured by advertiser desires. Some programming, such as classical music, sacred music, jazz, children's programs, poetry and controversial political or religious discussion, are most desired when not interrupted by advertising. Some programming would never draw advertiser interests because of its free form or controversial content. Some audience groups, including those defined by race, ethnicity, religion, language or age, are poorly served by commercial broadcasting in large part because few advertising

^{44/} Only nonprofit educational organizations are granted permits for these stations now. 47 C.F.R. §73.503(a). It may be necessary to liberally interpret this rule for LPFM, providing, for example, that unincorporated entities such as unions, clubs, or other entities of varying degrees of formality may qualify, freeing them from the considerable time and expense of seeking an IRS tax exemption. The expense of obtaining and maintaining a §501(c)(3) exemption well exceeds the cost of building a 50 watt LPFM station.

^{45/} 47 C.F.R. §73.501 restricts FM Channels 201-220 (88-92 MHz) band to noncommercial broadcasting. However, noncommercial stations are permitted on Channels 221-300 (92-108 MHz). The Commission apparently contemplates that noncommercial stations on Channels 221-300 will be regulated in much the same way as noncommercial stations on Channels 201-220. Compare 47 C.F.R. §73.503(a) with 47 C.F.R. §73.513.

decisionmakers belong to or understand these groups. Many advertisers hold stereotypes and prejudices about some audience groups, or they just do not know how to market to them. Some audience groups, even if understood and desired by advertisers, are numerically too small to attract advertising sold on a cost per thousand basis based on an entire MSA.

Unfortunately, noncommercial FM stations are few in number. Most are confined to a crowded 4 MHz band on the left side on the FM dial. Many sizeable communities enjoy only one or two full power noncommercial stations. On the other hand, as microbroadcasters who went on the air prematurely have already shown, many communities can support dozens of noncommercial LPFM stations built, run and sustained by volunteers. Imagine the demand for these stations if those operating them did not risk prosecution. Furthermore, imagine the quality of service these stations could provide if they could attract the moonlighting talent of professional broadcast employees, who obviously have been unavailable to microbroadcasters thus far.

LPFM stations should be operated noncommercially and owned by nonprofit entities. Thus, the Commission should not issue licenses to commercial operations proposing to operate LPFM stations noncommercially.^{46/} Commercial business owners would likely be too tempted to use LPFM stations to serve the interests of their commercial operations. The Commission lacks the resources to monitor whether commercial operators comply with the noncommercial

^{46/} The issuance of these licenses to commercial entities would appear to be prohibited by 47 C.F.R. §503(a). Nonetheless, there would be a meaningful role in LPFM commercial interests. If businesses wish to help LPFM, they can underwrite program costs, offer scholarships, fellowships or executives on loan, or take advantage of the procedure recommended herein to help minority training institutions with LPFM stations. See pp. 76-79 *infra*.

requirements or are disguising commercial operations as noncommercial ones.

The nonprofit sector of the economy is huge but it is vastly underrepresented on the air. Thus, there will be no shortage of nonprofit groups seeking these licenses. It follows that commercial ownership -- and certainly commercial operation -- should also be barred because it is not necessary to the development of the service, nor does it serve any need that nonprofit owners cannot serve better.

This conclusion leads naturally to a principle we will refer to often in these comments, which we call the "Rule of Nonreversibility."

The Rule of Nonreversibility is this: an agency should avoid decisions that cannot be changed later without upsetting the legitimate expectations of those who invested time, money and effort in good faith.

The Rule of Nonreversibility applies here. While an erroneous decision to limit LPFM to noncommercial ownership and operation is reversible later, an erroneous decision to allow commercial ownership or operation violates the Rule of Nonreversibility: it can be avoided and it would be difficult to reverse without upsetting the expectations of those who would have made investment decisions in good faith. Thus, only if experience shows that commercial ownership or operation is absolutely essential to the preservation of the service should the Commission reconsider and authorize commercial ownership or operation.

B. The maximum power should be 50 watts for urban stations and 100 watts for rural stations

The service's technical criteria should be tailored to fit the need for a multiplicity of small, locally-targeted, noncommercial stations. Thus, we agree with the National Lawyers Guild (NLG) and most other LPFM proponents that maximum power should initially be 50 watts urban and 100 watts rural.^{47/} We take no position on minimum power.^{48/}

Once again, the Rule of Nonreversibility applies. In the future, it would prove much easier to allow lower power LPFMs to increase power than to require higher power LPFMs to decrease power. Thus, the Commission should adopt the NLG proposal, revising this question only in the unlikely event that there is insufficient demand for lower power facilities.

LP100 and LP50 stations would have several advantages over LP1000 stations. They would certainly require less regulation. As proposed in the NPRM, they would be secondary stations, protecting full power stations but not requiring protection from full power stations.^{49/} They would be more numerous and less expensive to

^{47/} LP100 stations are proposed as a secondary service, with maximum facilities of 100 watts ERP and 30 meters (98 feet) HAAT. NPRM at 2483 ¶30. This would produce a 60 dBu signal contour at a distance of 5.6 km (3.5 miles) from the transmitter. Id. A 50 watt ERP LPFM station would produce a 60 dBu contour about two miles from the transmitter, depending on HAAT and terrain.

^{48/} We do not oppose 1-watt or 10-watt microradio operations, although their coverage areas would be so small that it would hardly seem worth the trouble for anyone to build them. Still, if the Commission authorizes microradio, our prediction might be proven wrong. When the Radio Act of 1912 was being debated, few thought ham radio would catch on either.

^{49/} We do not take a position on whether LPFM should be a primary or secondary service vis-a-vis full power stations. However, LPFMs originating local programming should be primary vis-a-vis FM translators and boosters, which originate no programming.

build and maintain than LP1000s. Furthermore, relatively few LP1000 stations can be built in large cities, and each one that is built might preclude a larger number of smaller LPFMs from being built.

Distance separations should be used initially to define interference requirements. They are easy to understand, thus permitting nonexperts to build them. See NPRM at 2487 ¶40. As suggested in the NPRM at 2488 ¶41, ultimately a contour protection-based licensing system should be developed if demand far exceeds supply. Such a system would accommodate many more stations, although it would require a more sophisticated computer program.

C. LPFM ownership criteria should promote diversity

As set out below, we advocate local ownership and control, a ban on local duopolies and LMAs, and a five year antitrafficking rule. Through these content-neutral, structural regulations, the Commission could greatly enhance the likelihood that the new stations would be used to enhance diversity of voices and viewpoints.

1. LPFM should be locally owned and controlled

The Commission absolutely should limit this new service to local ownership and control. Local owner-operators are almost certain to invest the time and money needed to create and maintain an LPFM station that would be responsive to local needs and interests.^{50/}

^{50/} The definition of "local" can be a liberal one. "Local" need not be confined to the station's service area, which would be very narrow, but it should not be a different MSA or distant town. This will ensure that those in charge of the station have some affinity or community ties to the service area. An analogy is found in local cable public access regulations, which often hold that a cable programmer must live somewhere in the same metropolitan area as the cable system, although not necessarily within the cable system's footprint.

The Commission could not enforce and should not require integration of ownership and management. Fortunately, though, it may predict that if local ownership and control are required, virtually all of these stations actually would be owner-operated.

Sometimes the Commission has adopted diversity-inhibiting ownership rules, believing them necessary to promote the development of new services. In extreme cases, it has even refused to license any nonincumbents, believing that only incumbents can "colonize" newly available spectrum.^{51/} This approach may be justified if the public needs to invest in new receivers and hopes to have something to listen to. But such an approach does not extend to LPFM, which would be compatible with existing receivers. Furthermore, there is no shortage of demand for LPFM stations from local owner-operators. Nonlocal owners offer no intrinsic benefits; surely the listening public is not writing to the FCC saying "we need more absentee owners!" Indeed, every station given over to nonlocal ownership merely denies a local entity a chance to be heard.

The Rule of Nonreversibility also applies here. See p. 18 supra. If the Commission limits licensees to local ownership, it can easily change its mind. But if it allows nonlocal ownership, it cannot change its mind without harming those who would have invested time, money and effort in good faith.

To implement a local ownership rule, the Commission should require that a majority of a licensee's board of directors, the head

^{51/} See, e.g., 47 U.S.C. §336 (1996) ("Spectrum Flexibility" provision in the 1996 Telecommunications Act, aimed at limiting digital TV to incumbents); cf. Review of the Technical Assignment Criteria for the AM Broadcast Service (Report and Order, 6 FCC Rcd 6273, 6306 ¶110 (1991) (only incumbents permitted to migrate to the AM expanded band (1605-1705 kHz) because they would vacate their former allotments and thus alleviate interference.)

of its board, and its CEO (if a different person) be local residents.^{52/}

Contrary to the doubts expressed in the NPRM at 2496 ¶62, Bechtel I and Bechtel II do not prevent the Commission from adopting a local ownership requirement. In the Bechtel litigation, the Court found that a nonlocal resident's proposal to hire an experienced manager was not inherently inferior to a (future) local resident's proposal to operate the station personally. The Court did not hold that there was no value to having local owner-operators; instead, it rested its decisions on the lack of record evidence that local ownership produced better service than experienced non-owner managers.^{53/} LPFM stations, by contrast, would be very low budget volunteer operations; few, if any would be able to compensate an experienced manager. An inexperienced manager who owns an LPFM station is always preferable to an inexperienced functionary beholden to an absentee owner. That is especially true for LPFM, which, unlike full power commercial and noncommercial broadcasting, is unlikely to draw financial support except from the local community. Thus, a local owner-operator will stand in the best position to provide good service with an LPFM station.

^{52/} The Commission has expressed concern about whether a nonprofit licensee claiming minority ownership status really was minority owned where two of its three directors (but not its CEO) were minorities. See Trinity Broadcasting of Florida, Inc., FCC 98-313 (released April 15, 1999). This confusion might have been avoided with an explicit requirement that the key decisionmaking person in the enterprise be a minority.

^{53/} The Court was also concerned that the benefits of integration of ownership and management were ephemeral since there was only a one-year holding period. Bechtel II, 10 F.3d at 879. We propose a five year antitrafficking rule. See p. 26 infra.

The Bechtel cases are also inapposite because a major purpose of LPFM would be to train local people to operate their own stations. Full power commercial stations are not designed to provide training; they are in business to make money. A local training purpose can best be fulfilled by local owner-operation. The Bechtel II court wondered why the FCC would prefer owner operation when corporate America does not,^{54/} but almost by definition, every school is, and has to be, locally controlled.

2. **Each owner should be permitted only one station. with IMAs prohibited**

No multiple ownership should be permitted. Commissioners Washburn and Rivera were correct in urging this approach for LPTV.^{55/} The Commission should follow their advice now.

As we have noted, suboptional ownership rules have often been adopted to ensure the rapid development of new service. See p. 21 n. 51 supra. Here, however, there are 13,000 expressions of interest. See NPRM at 2476 ¶11. Multiple ownership is hardly needed for LPFM to succeed.

The Rule of Nonreversibility also applies here. Whenever multiple ownership has been permitted erroneously, it has been almost impossible to break up. Never has the Commission required divestitures to break up multiple ownership combinations. Instead, it has provided for incentives (e.g. the tax certificate as it existed between 1971 and 1978), or allowed grandfathering, which

^{54/} Bechtel II, 10 F.3d at 877.

^{55/} See Low Power Television R&O, 51 RR2d at 525, 527 (separate statements of Commissioners Abbott Washburn and Henry Rivera) (advocating limits on multiple ownership in order to avoid the waste of much of the LPTV service for the rebroadcasting of programming already available on full power television).

benefits early entrants to the relative detriment of new ones. To avoid this, the Commission initially should prescribe one to a customer. If experience later shows that this was a mistake, the Commission can easily correct its error. But if experience shows that multiple ownership was a mistake, the Commission's error could never be corrected.

The NPRM seeks comment on whether "the proposed cross-ownership restriction will unnecessarily prevent individuals and entities with valuable broadcast experience from contributing to the success of the service[.]" NPRM at 2495 ¶58. These fears are unwarranted, for two reasons. First, as the Commission has long recognized, broadcast experience has minimal value in predicting whether a licensee will serve the public interest, since the necessary experience can be acquired on the job.^{56/} Second, there would be many ways in which experienced broadcasters can participate in LPFM even if they cannot own it outright. Experienced broadcasters can join LPFM station boards of directors, and they can volunteer their time as programmers or engineers. Most of the 300,000 people working in broadcasting love the airwaves; they would gladly help their unions, churches, lodges or civic groups build and run LPFMs. Retired broadcast professionals and broadcast educators are sure to pitch in. Finally, since consolidation has reduced the number of available full power jobs, there are scores of trained people unable to find work. Many would be happy to volunteer with LPFMs to keep their skills current.

^{56/} Policy Statement on Comparative Hearings, 1 FCC2d 393, 396 (1965).

We disagree in the strongest terms with the NPRM's surprising proposal that a single entity be permitted to own five or ten LPFM stations nationwide. Id. at 2495 ¶60. There is no conceivable public purpose for national multiple LPFM ownership. What could possibly justify precluding four to nine local speakers in order to allow one absentee speaker to be heard over five or ten facilities? LPFM is not a national service like full power commercial broadcasting; it's a local one. It ought to be owned by local people. See pp. 20-22 supra.

In attempting to justify national multiple ownership, the NPRM predicts that "[a]s with full power stations, we expect that economies of scale would allow licensees to improve their service to the listening public." NPRM at 2495 ¶60. In full power commercial broadcasting, these economies of scale allow group owners to employ fewer people. But the point of LPFM is to draw more people into broadcasting -- exactly the opposite result we could expect from group ownership. Volunteers can keep an LPFM mike open locally at virtually no cost, thus, there is no economic justification for group ownership. Furthermore, these same "economies of scale" would reduce service to the public, as more generalized fare replaces unique, locally originated fare.

Given the chance, large institutions that already have easy access to full power stations would quickly monopolize this new medium. They will outspend, outengineer and outmaneuver small local operators every time. Instead of 4,000 stations airing 4,000 voices, we'd have 4,000 stations airing 400 voices. Owing, again, to the Rule of Nonreversibility and the unfairness of divestitures, the Commission could never correct this grave mistake.

Finally, we agree that an LPFM operator should not be permitted to operate as a translator or booster. See NPRM at 2498 ¶68. The one very limited exception under which an LPFM station might retransmit another station's programming would be for training purposes. See pp. 76-79 infra.

3. There should be a five year minimum license holding period, waivable in hardship cases

An antitrafficking rule, waivable only in hardship cases, is especially important in the development of a new service. Such a rule would discourage speculators but would not frighten away committed local broadcasters.^{57/} It would prevent the filing of frivolous, poorly conceived applications, An antitrafficking rule would also permit listeners to receive the benefits of the FCC's licensing selections for a substantial period of time.^{58/}

D. Licenses should be awarded on a first come, first served basis, with mediation and paper hearings used as a last resort

The Commission's experience with the tax certificate policy demonstrates that in the world of full power commercial broadcasting, race-conscious remedies are needed to foster meaningful levels of minority ownership. Such remedies ought to be a last resort, to be used when race-neutral means cannot succeed.

^{57/} Speculators can operate even in a noncommercial environment, snapping up licenses and gambling that the Commission might change its rules later to allow multiple ownership, LMAs or commercial operations. A long holding period may also be the only way to discourage application mills. If first-come licensing is used, application mills can be expected to overload the system with hundreds of cloned applications filed on behalf of fictitious or uninterested individuals. Unless there were a long holding period, the application mills would then stage private auctions for a quick profits.

^{58/} See Bechtel I, 957 F.2d at 880. One reason we lost the tax certificate policy was that there was no meaningful antitrafficking rule.

LPFM may be the only broadcast service for which race-conscious licensing is unnecessary, except to promote minority training. See pp. 64-79 infra. The low cost and local audience targeting attributes of LPFM, coupled with the absence of alternative routes onto the airwaves, are likely to attract minority applicants even without a race-conscious licensing algorithm.

For full power broadcasting, we support comparative hearings with race-sensitive provisions to counteract the many institutional and financial pressures inhibiting minority ownership. But for LPFM, however, first-come first-served licensing is preferable in order to minimize costs. If comparative hearings are used, they should be designed to be as low-cost as possible -- as should noncomparative hearings on basic qualifications issues. All hearings should be preceded by mediation, using nonprofit-sector mediators familiar with broadcasting.^{59/} One goal of mediation should be the promotion of share-time operations.

If comparative hearings are used, the comparative criteria should favor applicants whose local officers and directors have longstanding records of community service.^{60/} Broadcast experience and past broadcast record should not be comparative factors, as they would activate the present-day consequences of past race and gender discrimination. Race or gender could be considered among several factors on a case by case showing that they would enhance program diversity or remedy past discrimination.

^{59/} Several of the Civil Rights Organizations would be willing and able to provide these mediation services.

^{60/} As noted above, Bechtel I and Bechtel II are inapposite because virtually all of these stations would be operated by their owners, as few, if any could afford to pay professional managers, and because LPFMs are local training facilities.

We are unalterably opposed to auctions, which benefit the financially blessed, and lotteries, which benefit the astrologically blessed. Wealth and the position of the stars in the heavens are uncorrelated with one's qualifications to serve the public. But one's initiative in being the first in line to propose a workable service is at least thinly predictive of good service to the public.^{61/}

The NPRM points out that a first-come approach might lead to a glut of applications that exceeds the Commission's processing capacity. As an alternative to first-come, the NPRM proposes windows, hoping that applicants will file throughout each window. NPRM at 2507 ¶102. Windows won't work. In Docket 80-90, applications usually arrived in the last five minutes of each window. Applicants needed every last minute to prepare their applications, and applicants did not want competitors to copy their engineering, claim or interfere with their sites, or trump them on structured comparative criteria.

To secure the benefits of first-come licensing without having overwhelming the system, the Commission should use a hybrid approach -- first-come within each of several windows. It could classify windows by station size, frequency, or by groups of states, as it does for license renewals. Applications would then be first-come

^{61/} The Commission would need to monitor a first-come system very carefully. A pure first-come system might disadvantage large institutions, particularly colleges and public school systems, which would plan to make a substantial investment in outstanding LPFM service and student training. These activities take time to plan and finance. A first-come system might be vulnerable to application mills, which would file cloned multiple applications on behalf of fictitious or uninterested individuals, leading to private auctions if there is no holding period. But see p. 26 supra (recommending a five year antitrafficking period).

within each window. Windows could be reopened for a second round after all first-round windows close.

**E. Those who went on the air prematurely,
acting out of good faith civil disobedience,
should not be ineligible for LPFM licenses**

The NPRM tentatively recommends that "[p]arties who persist in unlawful operation after the Commission has taken...enforcement actions could be deemed per se unqualified." Id. at 2498 ¶67.

We in civil rights are especially aware of the danger to individual liberty interests presented by this unfortunate approach.

The determination of whether one has good character must be governed by fundamental due process. Every applicant is entitled to a hearing before an ALJ if her qualifications are challenged. Those who established microbroadcasting stations prematurely have a right to be heard, and their defenses will often have substance.^{62/}

Unlike criminals motivated by revenge or hate, early microbroadcasters risked prosecution and ineligibility for employment in commercial broadcasting. They did not seek personal gain. Many were driven by deep and genuine religious convictions. They did not understand -- as those of us closer to Washington do understand -- that broadcasting without a license is a serious offense. Many believed, in absolute good faith, that the government was attempting to criminalize certain speech by shutting them down.

^{62/} A related question is "whether there are circumstances under which such a party could be considered rehabilitated." NPRM at 2498 ¶67. The rehabilitation paradigm is inappropriate for what could be perceived as a thought crime. See infra at 30-33. This is not China, Iran or Cuba, where pro-democracy leaders must be "re-educated" before they can be reintegrated into society. The rehabilitation paradigm suggests that a person must renounce his or her anti-government thoughts in order to be deemed acceptable to broadcast any other thoughts to the public. The Commission cannot really intend so antidemocratic a result.

They could not understand why the FCC would not license them immediately if there were room for them on the publicly owned spectrum. They could not understand why radio, the most democratic mass communications medium, ironically is burdened by technical rules structured to exclude small, local voices. Their outlook is entitled to respect, whether or not one shares it.

We have come to know many of these early microbroadcasters. Most are highly committed, dedicated and full of integrity. Of course a few do lack good character -- just as a few incumbent full power broadcasters lack good character.

But anyone who places her career and clean criminal record on the line to take on the United States government is often performing a public service. These individuals often possess the highest character. One who is willing to undergo the huge expense and personal risks associated with taking on the government is a patriot. And one who broadcasts openly, willingly accepting that the government will attempt to shut her station down, is engaging in an act of civil disobedience requiring deep personal will.

The tradition of civil disobedience, not unique to America but peculiarly American, recognizes the innate right of a human to follow her own conscience in the face of injustice. The principle was first expressed by Henry David Thoreau, who believed that one's sense of right ought to outweigh any law. Describing his refusal to cooperate with the institution of slavery, Thoreau wrote in 1849:^{63/}

^{63/} Henry David Thoreau, On Civil Disobedience, 1987 New America Library Edition, p. 225.

Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience, then? I think that we should be men first, and subjects afterwards. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume, is to do at any time what I think right.

Informed by Thoreau's teachings, Mahatma Gandhi invoked the principle of civil disobedience to liberate India from a colonial ruler. Gandhi wrote:^{64/}

Civil disobedience is the inherent right of a citizen. He dare not give it up without ceasing to be a man. Civil disobedience is never followed by anarchy. Criminal disobedience can lead to it. Every state puts down criminal disobedience by force. It perishes, if it does not. But to put down civil disobedience is to attempt to imprison conscience.

In Gandhi's tradition, Dr. Martin Luther King, Jr. spoke these words:^{65/}

History unfortunately leaves some people oppressed and some people oppressors. And there are three ways that individuals who are oppressed can deal with their oppression. One of them is to rise up against their oppressors with physical violence and corroding hatred....Another way is to acquiesce and give in, to resign yourself to the oppression....But there is another way. And that is to organize mass nonviolent resistance based on the principle of love. It seems to me that this is the only way as our eyes look to the future.

Thus, civil disobedience is not even a distant cousin of common lawlessness. Thoreau, Gandhi and King, the leading philosophers and practitioners of civil disobedience, each recognized that civil disobedience has three principal tenets.

^{64/} Clayborne Carson and Peter Holloran, A Knock at Midnight: Inspiration from the Great Sermons of Reverend Martin Luther King, Jr., "Loving Your Enemies," New York: Warner Books, 1998, pp. 56-57.

^{65/} Richard Attenborough, The Words of Gandhi, New York: New Market Press, 1982, p. 57.

First, those exercising civil disobedience must be motivated by a good faith desire to oppose injustice. They need not attempt imminently to change the law; thus, they need not litigate against the government. Instead, they may try to galvanize public opinion. Thus, a microbroadcaster trying to help an underserved community, or airing controversial speech or poetry, may have been acting out of a desire to strike a blow for free speech. That is not true of one who uses the spectrum only to lob sophomorisms. Not all disobedience is civil disobedience.

Second, those exercising civil disobedience must do so openly and notoriously. Public opinion can hardly be galvanized in secret. However, she need not help the government. For example, she may go limp when arrested, or she may exercise her right to refuse to consent to a search.

Third, those exercising civil disobedience must exercise care not to harm others by their actions. They may invite arrest by lying down and blocking traffic to call public attention to an important principle, or they may invite prosecution by broadcasting at variance with current second and third adjacent channel restrictions. These actions may inconvenience others, but they do not harm others. On the other hand, those exercising civil disobedience may not crash their cars into opposing traffic. Nor may they broadcast in a manner harmful to air navigation. Thus, in the example given in the NPRM at 2497 ¶65, if the microbroadcasters shut down for endangering air traffic had notice of the danger of their activities and did not correct them immediately, they almost surely lack the character to be licensees.

The NPRM erroneously equates good character with one's belief in the correctness of the government's legal position on microbroadcasting. However, one can disagree in good faith with even a generally accepted government position and still possess good character. For example, in 1955, the FCC openly embraced segregation;^{66/} until 1973, the FCC maintained that race did not contribute to diversity in broadcasting;^{67/} and until Chairman Wiley convened the 1977 minority ownership conference, the FCC felt it needed to do nothing to help minorities own stations. If opposition to segregation and exclusion caused an adjudication of bad character, broadcasting today would still be virtually all-White, and none of us might be entitled to consideration of this pleading.

Denying broadcast authorizations for bad character is rare, being reserved for intentional discriminators, child molesters and thieves. The character standard is not so invasive that it reaches those who merely disagree with the government on the meaning of the First Amendment.

Even the most regimented branches of government have come to tolerate dissent, as exemplified by the Selective Service System's decent treatment of conscientious objectors. As the guardian of the First Amendment, the Federal Communications Commission should be no less tolerant of dissent. Early microbroadcasters assumed substantial personal risk to establish an important principle, and for that they deserve respect, due process and fair treatment.

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^{66/} See Southland Television, 10 RR 699, recon. denied, 20 FCC 159 (1955) ("Southland"), dissected at pp. 42-43 infra.

^{67/} TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973).